FF.ED U.S. DISTRICT COURT

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David M. Wahlquist (Bar No. 3349)
KIRTON & McCONKIE
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, UT 84145-0120

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

STATE OF UTAH, CENTRAL DIVISION

JENNIFER STEIMKE, as trustee of the : ODETTE GRAHAM TRUST, sole beneficiary : of the MICHELON FAMILY TRUST, and sole : devisee and representative of the ESTATE OF : LYNDA STEIMKE MICHELON, :

Plaintiff.

v.

JAE FORSCHEN, DAVID J. ORR, : individually and dba WORLD : CONTRACTUAL SERVICES, HARVEST : MARKETING, L.L.C., FIRST HARVEST, : L.L.C., FRANK L. DAVIS, and JOHN DOES 1: through 10, :

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Case No. 2:03CV-0487

Judge Dale A. Kimball

Plaintiff Jennifer Steimke submits this memorandum of points and authorities in support of her Motion for Entry of Final Judgment. Steimke seeks entry of judgment against defendants Frank L. Davis, First Harvest, LLC and Harvest Marketing, LLC in the amount of \$620,000 plus \$1,000 per week after September 29, 2005 until paid in full. Steimke also requests the Court to expressly

direct entry of the judgment as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The facts material to this motion are as follows:

- 1. On August 2, 2005, the Court entered its Memorandum Decision and Order ("Order"). On p. 9 of the Order, the Court granted Steimke's Motion For Partial Summary Judgment seeking judgment against Frank L. Davis, Harvest Marketing, LLC and First Harvest, LLC ("Davis Defendants") for amounts due under the Davis Note. The motion sought judgment for the principal amount of the note, plus late fees/interest at the rate of \$1,000 per week after March 3, 2000 (the due date of the note) plus costs and attorneys' fees. The award of attorneys' fees and costs was based upon the Davis Defendants' promise in the Davis Note to pay all attorneys' fees and costs incurred in collecting on the note. (*See* Order, pp. 4 through 10; also Affidavit of David M. Wahlquist, para.
- 2. The principal amount of the note is \$175,000. (See Order, p. 4; also Affidavit of David M. Wahlquist, para. 3)
- 3. The late fees/interest accruing after March 3, 2000 through September 29, 2005 is \$290,000. (Affidavit of David M. Wahlquist, para. 4)
- 4. Steimke hired Kirton & McConkie to assist her in this action to collect on the Davis Note. Because of the risk involved and Steimke's financial circumstances, she engaged Kirton & McConkie on a contingency fee basis. Steimke entered into a written agreement wherein she agreed to pay Kirton & McConkie a one-third contingency fee and to reimburse Kirton & McConkie for all

out-of-pocket costs, including but not limited to costs for copying, long distance telephone, deposition costs, travel costs, computer research costs, postage, and filing fees. (Affidavit of David M. Wahlquist, para. 5)

- 5. The total judgment exclusive of attorneys' fees and costs is \$465,000. One third of that amount is \$155,000 which Steimke will incur as attorneys' fees under her contingency fee arrangement with Kirton & McConkie. (Affidavit of David M. Wahlquist, para. 6)
- 6. Attached as Exhibit "A" to the Affidavit of David M. Wahlquist is an accurate accounting of time spent by attorneys and legal assistants on behalf of Steimke. Also included with that exhibit is a summary of hours spent by individual attorney and legal assistant and the charges Steimke would have owed Kirton & McConkie for these services (exclusive of interest) if she had engaged Kirton & McConkie on an hourly basis at Kirton & McConkie's current hourly rates. (Affidavit of David M. Wahlquist, para. 7)
- 7. Plaintiffs in collection actions such as this one frequently engage legal counsel on a contingency fee basis. There are local attorneys whose sole practice is to collect amounts due on various instruments exclusively on a contingency fee basis. At the time Frank Davis signed the Davis Note, he should have reasonably anticipated that plaintiff may engage her counsel on a contingency fee basis in the event she was compelled to commence legal action to enforce the note. (Affidavit of David M. Wahlquist, para. 8)
- 8. Although some contingency fees are higher, a one-third contingency fee is standard in this community. (Affidavit of David M. Wahlquist, para. 9)

- 9. Steimke has also incurred costs in this matter in the amount of \$6,784.73. An accurate itemization of those costs is attached as Exhibit "B" to Mr. Wahlquist's Affidavit. (Affidavit of David M. Wahlquist, para. 10)
- 10. The total amount due Steimke under the Davis Note as of September 29, 2005 will be \$626,784.73 together with interest/late charges thereafter at the rate of \$1,000 per week until paid in full. (Affidavit of David M. Wahlquist, para. 11)
- 11. The Court's Order constitutes a complete adjudication of the Eighteenth Cause of Action set forth in Steimke's complaint. (Affidavit of David M. Wahlquist, para. 12)
- 13. Steimke stipulates and represents to the Court that she is willing to dismiss all other causes of action in her complaint as against Frank L. Davis, Harvest Marketing, LLC and First Harvest, LLC to become effective upon the Court's Order with respect to the Eighteenth Cause of Action becoming final and non-appealable. Only if the Order is reversed on appeal would she retain her other claims against said defendants. (Affidavit of David M. Wahlquist, para. 13)

ARGUMENT

I. STEIMKE IS ENTITLED TO JUDGMENT AGAINST THE DAVIS DEFENDANTS IN THE AMOUNT OF \$626,784.73 PLUS \$1,000 PER WEEK AFTER SEPTEMBER 29, 2005 UNTIL PAID IN FULL

The Court has awarded Steimke judgment against each of the Davis Defendants for the principal amount of the Davis Note (\$175,000), plus late fees/interest, plus Steimke's attorneys' fees and costs. The late fees/interest will total \$290,000 through September 29, 2005. (Affidavit of David M. Wahlquist, para. 3) Steimke's costs incurred in this action total \$6,784.73. (Affidavit of David M. Wahlquist, para. 9)

Steimke has incurred attorneys' fees in the amount of \$155,000, which is one-third of the amount due under the Davis Note exclusive of attorneys' fees and costs. Steimke's attorneys' fees are based upon a contingency fee agreement with Kirton & McConkie wherein she agreed to pay costs plus a standard one-third contingency fee. (Affidavit of David M. Wahlquist, para. 4) Since the award of fees is based upon a Utah state law claim, the amount of fees to be awarded is governed by Utah law. *Mangold v. California Public Utilities Commission*, 67 F. 3d 1470 (9th Cir. 1995); and *Mitzel v. Westinghouse Electric Corporation*, 72 F. 3d 414 (3rd Cir. 1995).

In Campbell v. State Farm Mutual Automobile Insurance Company, 65 P. 3d 1134 (Utah 2001), the Utah Supreme Court held that contingency fees should be used as the basis of a fee award if it was reasonably foreseeable by the defendant that the plaintiff may employ an attorney on a contingency fee basis. *Id.* at 1169-1170. Plaintiffs in cases involving collection on notes and other accounts receivable commonly engage legal counsel on a contingency fee basis. (Affidavit of David M. Wahlquist, para. 8) The Davis Defendants should have reasonably foreseen that Steimke may engage her counsel on a contingency fee basis in this matter. For these reasons, Steimke is entitled to an award of \$155,000 for her attorneys' fees.

The total judgment to which Steimke is entitled is \$626,784.73 together with late fees/interest at the rate of \$1,000 per week from September 29, 2005 until paid in full.

¹ The United States Supreme Court ultimately reversed the Utah Supreme Court's ruling in *Campbell* with respect to the amount of punitive damages awarded. The Utah Supreme Court's ruling with respect to attorneys' fees was not affected and remains the law in the State of Utah.

II. THE COURT SHOULD EXPRESSLY DIRECT ENTRY OF JUDGMENT AS A FINAL JUDGMENT PURSUANT TO RULE 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides in part:

When one or more claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . .

In its Order, the Court has completely adjudicated Steimke's Eighteenth Cause of Action against the Davis Defendants. Having fully resolved one of Steimke's claims, the Court would be justified in directing entry of judgment under Rule 54(b) on that basis alone. The propriety of directing an entry of judgment is even more evident, however, because Steimke has stipulated that she will dismiss the remainder of her claims against the Davis Defendants to become effective upon the Court's Order with respect to her Eighteenth Cause of Action becoming final and non-appealable. Such dismissal will likely negate the need for a trial in this matter, saving the resources of the Court and the parties. There is no just reason for delay and the Court should expressly direct the entry of judgment as final under Rule 54(b) in order to accrue this benefit.

CONCLUSION

For the foregoing reasons, Steimke requests the Court to direct entry of a final judgment pursuant to Rule 54 (b) against the Davis Defendants jointly and severally on Steimke's Eighteenth Cause of Action. Said judgment should be in the amount of \$626,784.73, together with interest/late fees in the amount of \$1,000 per week after September 29, 2005 until paid in full.

Respectfully submitted this 16th day of August, 2005.

KIRTON & McCONKIE

David M. Wahlquist)
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

true copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT by the method indicated below, to the following: (U.S. Mail, Postage Prepaid Stephen Quesenberry HILL, JOHNSON & SCHMUTZ, L.C. () Hand Delivered () Overnight Mail Jamestown Square 3319 North University Avenue () Facsimile Provo, UT 84604 Attorneys for Defendants Frank Davis, Harvest Marketing, LLC and First Harvest, LLC David J. Orr, Pro Se (YU.S. Mail, Postage Prepaid () Hand Delivered 5449 Suntree Avenue () Overnight Mail West Valley, UT84120 () Facsimile Jae Forschen, Pro Se (YU.S. Mail, Postage Prepaid () Hand Delivered 406 East 3335 South, Apt. 16

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KIRTON & MCCONKIE
DRAFT STATEMENT

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1 H00110	SUBPOENAS.	187
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1 H00085	COUNSEL FOR DEFENDANT JAY FORSHEN.	17
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1 H00085	CONFER WITH FORSCHEN COUNSEL RE: STATUS.	5
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CLIENT 11425 STEIMKE, JENNIFER
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1 Н00230	VIDEOGRAPHER, ETC.)3.
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1 ноо230	TELEPHONE CONFERENCE WITH MARLEE			104
1 ноо230	OF MATTERS AND DATE FOR DEPOSITION;			187
1 ноо230	COLBY, COUNSEL FOR PATTERSON, RE STATUS			7-[
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1 ноо230	RE: PATTERSON DEPOSITION			: 59
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1 ноо228	DAVID M. WAHLQUIST RE STATUS OF MATTERS;			7/0
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KIRTON & MCCONKIE
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CLIENT 11425 STEIMKE, JENNIFER
MATTER CT 1 CONTINGENCY TYPE A

** UNBILLED HOURS AND FEES *****

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PARALEGAL SERVICES: EXTENDED TELEPHONE			
SCHEDULING HIS DEPOSITION, ETC.			
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	(DAVID M. WAHLQUIST) UPDATE DAVE WAHQLUIST ON STATUS. MAKE FINAL EDITS ON BRIEF. ASSIGN LEGAL ASSISTANT TO CONDUCT CASE PULL SO I CAN MAKE FINAL REVIEW OF ALL CASES AND MAKE SURE ALL AUTHORITIES ARE ACCURATE AND UP TO DATE. (DAVID M. WAHLQUIST) REVISE AND FINALIZE MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT. DRAFT, REVISE AND FINALIZE RULE 56(F) AFFIDAVIT OF DAVID WAHLQUIST. MEET WITH DAVID WAHLQUIST TO REVIEW CHANGES NEEDED TO MEMORANDUM.	RESEARCHING AND DRAFTING MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT. (DAVID M. WAHLQUIST) FINISH DRAFTING INITIAL DRAFT OF MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT. REVIEW AND MAKE FIRST EDIT. UPDATE DAVE WAHLOUIST ON STATUS.		TRANSCRIPTS AND THEN REVISE STATEMENT OF FACTS TO CLARIFY AND HIGHLIGHT EVIDENCE THAT FRANK DAVIS HAD KNOWLEDGE THAT MICHELON TRUST MONIES WERE BEING USED TO FUND BUY-IN TO THE DEBT ELIMINATION SCHEME. (DAVID M. WAHLQUIST) CONTINUE DRAFTING	**************************************

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CLIENT DISBURSEMENTS REPORT KIRTON & MCCONKIE

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Itemization of Costs

Ryan Frazier, attorney	4.8 hrs. x \$175.00 =	\$ 840.00
David M. Wahlquist, attorney	121.8 hours x \$275.00 =	33,499.00
James E. Ellsworth, attorney	.5 hrs. x \$205.00 =	102.50
Thomas A. Mecham, attorney	.5 hrs. x \$200.00 =	100.00
Daniel J. McDonald, attorney	45.7 hrs. x \$190.00 =	8,683.00
Adam Wahlquist, legal assistant	2.0 hrs. x \$25.00 =	50.00
Betty Porter, legal assistant	10.6 hrs. x \$110.00 =	1,166.00
	Total	\$ 44,440.50

David M. Wahlquist (Bar No. 3349) KIRTON & McCONKIE 1800 Eagle Gate Tower 60 East South Temple P.O. Box 45120 Salt Lake City, UT 84145-0120

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

STATE OF UTAH, CENTRAL DIVISION

JENNIFER STEIMKE, as trustee of the ODETTE GRAHAM TRUST, sole beneficiary:

of the MICHELON FAMILY TRUST, and sole: FINAL JUDGMENT AGAINST FRANK L. devisee and representative of the ESTATE OF:

LYNDA STEIMKE MICHELON,

DAVIS, FIRST HARVEST, LLC AND HARVEST MARKETING, LLC

Plaintiff,

Case No. 2:03CV-0487

v.

Judge Dale A. Kimball

JAE FORSCHEN, DAVID J. ORR, individually and dba WORLD CONTRACTUAL SERVICES, HARVEST MARKETING, L.L.C., FIRST HARVEST, L.L.C., FRANK L. DAVIS, and JOHN DOES 1: through 10,

Defendants.

Plaintiff's Motion For Entry of Judgment having come before the Court, the Court having issued its Memorandum Decision and Order dated August 2, 2005 granting Plaintiff's Motion

For Partial Summary Judgment and having reviewed Plaintiff's motion documents, Affidavit and Memorandum of Fees and Costs, and Bill of Costs, and being advised in the premises,

THE COURT HEREBY ORDERS as follows:

- 1. Judgment is hereby granted in favor of Plaintiff Jennifer Steimke against defendants Frank L. Davis, Harvest Marketing, LLC, and First Harvest, LLC jointly and severally on Plaintiff's Eighteenth Cause of Action in the amount of \$626,784.73 plus late fees/interest in the amount of \$1,000 per week from September 29, 2005 until paid in full.
- 2. The Court expressly directs entry of judgment in said amount as a final judgment pursuant to Rule 54(b) on the ground that it has completely adjudicated Plaintiff's Eighteenth Cause of Action. Moreover, the Court notes that Plaintiff has stipulated to dismiss all other claims in her complaint against Frank L. Davis, Harvest Marketing, LLC and First Harvest, LLC to become effective upon this Judgment becoming final and non-appealable. Therefore, directing entry of this Judgment will at least resolve all claims against the parties against which Judgment is entered and may even obviate the need for a trial in this matter, thus conserving the resources of the Court and the parties. For these reasons, the Court finds that there is no just reason for delay in having this Judgment become final.

Dated this day of	, 2005.
	BY THE COURT:
	Honorable Dale A. Kimball United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August, 2005, I caused to be served a true copy of the foregoing FINAL JUDGMENT by the method indicated below, to the

Stephen Quesenberry (U.S. Mail, Postage Prepaid HILL, JOHNSON & SCHMUTZ, L.C. () Hand Delivered () Overnight Mail Jamestown Square 3319 North University Avenue () Facsimile Provo, UT 84604 Attorneys for Defendants Frank Davis, Harvest Marketing, LLC and First Harvest, LLC David J. Orr, Pro Se (yU.S. Mail, Postage Prepaid () Hand Delivered 5449 Suntree Avenue West Valley, UT84120 () Overnight Mail

Jae Forschen, Pro Se 406 East 3335 South, Apt. 16 Salt Lake City, UT 84115

following:

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